ORIGINAL

NO. 89-527

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LAWRENCE KINCHELOE,

Petitioner,

vs.

MICHAEL ROBTOY,

Respondent.

KENNETH DUCHARME,

Petitioner,

vs.

NEDLEY G. NORMAN, JR.,

Respondent.

RESPONDENT MICHAEL ROBTOY'S LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Michael Robtoy, pursuant to Rule 46.1 and 18 U.S.C. §3006A(d)(6), asks leave to file the attached Consolidated Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Respondent previously has been granted leave to

proceed in forma pauperis and present counsel, David B. Bukey, has served as respondent's appointed counsel pursuant to the Criminal Justice Act in the Ninth Circuit Court of Appeals since his appointment in June 1987.

DATED this 26th day of October, 1989.

BUKEY & BENTLEY

By: David B Bukey
David B. Bukey
Counsel of Record for
Michael Robtoy

NO. 89-527

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LAWRENCE KINCHELOE,

Petitioner,

vs.

MICHAEL ROBTOY,

Respondent.

KENNETH DUCHARME,

Petitioner,

vs.

NEDLEY G. NORMAN, JR.,

Respondent.

CONSOLIDATED BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BUKEY & BENTLEY
David B. Bukey
1111 Third Avenue, Suite 1060
Seattle, WA 98101
(206) 343-9391
Counsel of Record for Respondent
Michael Robtoy

John B. Midgley
2200 Smith Tower
Seattle, WA 98104
(206) 682-1948
Counsel of Record for Respondent
Nedley Norman

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
COUNTER-STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	4
1. This Case Affects Few People and Does Not Present Any Issue of Retroactive Application of State Created Rights	4
2. The Court of Appeals' Decision was Fully Consistent with this Court's Decision in Corbitt v. New Jersey, 439 U.S. 212 (1978)	7
3. The Court of Appeals Granted Respondents the Appropriate Remedy Mandated by a Correct Resolution of Settled Constitutional Principles	10
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Chatman v. Marquez, 754 F.2d 1531 (9th Cir.), cert. denied, 447 U.S. 841 (1985) 12, 13

Commonwealth v. Bethea, 379 A.2d 102 (Penn. 1977) .. 12

Corbitt v. New Jersey, 439 U.S. 212 (1978) 7, 8, 9, 10, 11

In Re Lawallen, 152 Cal. Rptr. 528, 590 P.2d 383 (Cal. S.Ct. 1979) 12

Johnson v. Morris, 87 Wn.2d 922, 557 P.2d 1299 (1976) 5

Ludwig v. Massachusetts, 427 U.S. 618 (1976) 12

People v. C, 27 N.Y.2d 79, 261 N.E.2d 620 (N.Y. App. 1970) 12

Petition of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980) 5

Robtoy v. Kincheloe, 871 F.2d 1478 (9th Cir. 1989) . 7

Scarf v. United States, 606 F. Supp. 379 (E.D. Va. 1985) 12

Solem v. Helm, 463 U.S. 277 (1983) 7, 9, 10

State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981) 1, 2, 6, 7 9, 10

State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980) ... 1, 2, 3, 4 6, 7

State v. Nichols, 247 N.W. 2nd 249 (Iowa 1979) 12

State v. Pittman, 54 Wn. App. 58, 772 P.2d 516 (1989) 5

TABLE OF AUTHORITIES-Continued

	Page
CASES	
State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982) ..	2, 3, 6
United States v. Chavez, 627 F.2d 953 (9th Cir. 1980), cert. denied, 450 U.S. 924 (1981)	11
United States v. Jackson, 390 U.S. 570 (1968)	1, 3, 6, 7 10, 11
United States v. Porter, 513 F. Supp. 245 (M.D. Tenn. 1981)	12
Veilleux v. Springer, 300 A.2d 620 (Vt. 1973)	12
STATUTES	
RCW 9A.32.040(3)	4
RCW 9.95.115	4
RCW 10.94.020	4
OTHER AUTHORITIES	
Washington Rule of Criminal Procedure 4.2(a)	4

COUNTER-STATEMENT OF THE CASE

In their Statement of the Case petitioners make troublingly misleading statements about the treatment of respondents' case in the state and federal courts below. Petitioners imply that the Washington Supreme Court did not apply, on respondents' direct appeals, the Washington Supreme Court's earlier decision in State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980). Yet, as is shown below, in the appeals of respondents and five others sentenced to death, the Washington Supreme Court in fact directly applied the Martin decision in State v. Frampton, et al., 95 Wn.2d 469, 627 P.2d 922 (1981).[1]

---

[1] In Frampton the major question in the direct appeal of respondents and others was the application to the defendants' sentences of United States v. Jackson, 390 U.S. 570 (1968), in light of the holding of State v. Martin. Although some of the Washington justices would have overruled Martin, not one suggested that Martin should not be applied in respondents' cases if it were not overruled, and not one suggested that Martin's application raised any issue of retroactivity:

> The five issues which the court accepted for argument are:
>
> 1. Whether the present statutory scheme for imposing the death penalty is unconstitutional in light of State v. Martin . . .
>
> 2. If so, may the state still seek and have imposed in cases of aggravated first degree murder, the punishment of life imprisonment without possibility of parole . . .

State v. Frampton, supra, 627 P.2d at 924 (opinion of Dolliver, J.). See also, 627 P.2d at 927 ("we reaffirm our holding in State v. Martin . . .").

> The problem is here because of this court's interpretation of the aggravated murder statute in State v. Martin . . . If the error of that interpretation is recognized, the statutes are not

Accordingly, petitioners' claim that "the Court of Appeals [in this case] . . . gave the decision in State v. Martin a retroactive effect" when "the Washington Supreme Court refused to apply the Martin decision . . . to respondents" (petition at 6, n.6) is false. The Washington Supreme Court not only applied Martin, but vacated the death sentences of respondents and others without any question of "retroactivity" being raised or discussed. The Washington Supreme Court specifically rejected the state's suggestion that Martin be overruled. Retroactivity has never been considered by any court which has considered respondents' claims.

Another overstatement is petitioners' assertion that in State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982), the Washington court refused to apply Martin retroactively to Mr. Robtoy's sentence. This also is incorrect. The decision in State v. Robtoy involved a claim by Robtoy, after defending fully at trial and losing, that he should have been permitted to plead guilty to obtain a lesser sentence. The Washington Supreme Court rejected this claim but did not do so on the basis of retroactivity

---

invalid under United States v. Jackson . . .

627 P.2d at 938 (opinion of Rosellini, J.).

> I am compelled to agree . . . that the death penalty statute, as it now stands, is unconstitutional . . . State v. Martin . . . is correct . . .

627 P.2d at 944 (opinion of Stafford, J.). See finally, 627 P.2d at 949 (opinion of Dore, J.), (arguing with the result in Martin) and 627 P.2d at 952 (opinion of Dimmick, J.) (". . . Martin is stare decisis . . .").

considerations. Rather, the court ruled that Robtoy could not be permitted to "gamble" by going to trial only to seek to vacate his earlier not guilty plea after the fact. The Washington Supreme Court's entire treatment of the issue is as follows:

> We first note that there is no constitutional right to plead guilty to a criminal charge. United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). Beyond this, Robtoy can point to no case authority, statute, or court rule which gives him that right at this late date. The situation here is thus quite unlike the one in State v. Martin, 94 Wash.2d 1, 614 P.2d 164 (1989), where we found the right to plead guilty in CrR 4.2(a). A plea of not guilty maintains all of the rights of the defendant and places in issue all elements of the offense charged. State v. Riley, 63 Wash.2d 243, 244, 386 P.2d 628 (1963). Certainly, no defendant is entitled to gamble on submitting a case to a jury on the theory that he has entered a plea of not guilty and, then, after verdict, say that he was prejudiced by not having been given an opportunity to plead guilty.

653 P.2d at 293. The issue of Martin's retroactivity was neither addressed by the parties nor discussed by the Washington Supreme court.

Finally, the State of Washington's Petition overlooks the fact that it never has presented an argument to any court which has considered respondents' claims regarding the retroactivity of the Martin decision. The state's argument to the Court of Appeals in both Robtoy and Norman's cases below was twofold: that respondents lacked standing to assert a Jackson claim and that the Jackson claim should be denied on the merits. It lost on both issues.

The state's petition for certiorari thus offers to this Court an imprecise and disingenuous recitation of prior

proceedings which presents a distorted picture of the history and issues actually determined in this case.[2]

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Case Affects Few People and Does Not Present Any Issue of Retroactive Application of State Created Rights

This case involves the review of sentences of a small number of individuals under a now repealed statute (see State's Petition at p. 8, n.9). It should have little or no precedential effect on death penalty cases and, contrary to the state's suggestion, does not present any issue involving the relationship between state and federal courts.

Contrary to petitioners' argument, State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), did not establish a new constitutional principle; rather, it interpreted "existing law." The court interpreted a state criminal rule (Washington State Criminal Rule 4.2(a)) and two then existing statutes (repealed statute RCW 10.94.020 and RCW 9A.32.040(3); and 9.95.115), in holding that "under existing law, the maximum penalty on a plea of guilty to first degree murder is life imprisonment with a possibility of parole." State v. Martin, 614 P.2d at 165. (Emphasis supplied) The Court of Appeals' conclusion in respondents' appeals that "Martin, however, neither altered nor added to Washington's death penalty statute, but merely

---

[2] The state's petition also incorrectly asserts that Robtoy "apparently was never charged" with a strangulation murder of a woman. (State's Petition at 7, n.7.) This is incorrect. Robtoy received a life sentence for that crime following a guilty plea. The sentence is to run consecutively.

interpreted it" was a correct statement of Washington state law. 871 F.2d at 1481.

Petitioners' statement that "[t]he decision as to whether a state court decision based on state law should be applied retroactively is a state, not federal question . . ." (Petition at 8) is true but irrelevant here. As shown, no retroactivity argument ever has been presented in these cases and no court has made a retroactivity decision. Moreover, the state's argument overlooks the very body of state law governing such issues, developed by the Washington Supreme Court. The Washington courts have held unequivocally that questions concerning the proper construction of Washington criminal statutes do not present issues of retroactivity. Petition of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980) (holding that the sentencing court has the power to correct an erroneous sentence at any time); Johnson v. Morris, 87 Wn.2d 922, 927-28, 557 P.2d 1299 (1976). In Johnson, the court held that, under Washington law:

> It is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it. In other words, there is no 'retroactive' effect of the court's construction of a statute, rather once the court has determined the meaning, that is what the statute has meant since its enactment.

557 P.2d 1304 (emphasis supplied). Cited with approval in State v. Pittman, 54 Wn. App. 58, 772 P.2d 516, 520 (1989) (emphasis in the Pittman opinion). Given this fundamental tenet of Washington law, the Court of Appeals in the present cases could only have

construed the now repealed Washington Statute as it ". . . has meant since its enactment." To have undertaken a retroactivity analysis would have been in derogation of the very principle of federalism which petitioner invokes.

Taking State v. Martin, State v. Frampton and State v. Robtoy together, it is clear that as a matter of Washington state law, the only possible sentence which Mr. Robtoy and Mr. Norman could have received upon a plea of guilty under the then existing death penalty statute would have been life with possibility of parole. Any other sentence would have been void in view of the Martin decision and, had respondents pled guilty, would have to have been later modified to a term of life with parole.

In short, for a variety of reasons the Court of Appeals' decision in this case cannot be construed as having "created" any new federal rights, retroactively applied or otherwise. In State v. Martin the Washington Supreme Court interpreted existing Washington statutes and concluded that Martin could not receive any sentence other than life with parole upon a guilty plea. In State v. Frampton that same court held that the disparity in the same statutory scheme violated the principles of United States v. Jackson and required that the death penalty provisions be struck down. The Court of Appeals merely applied settled federal constitutional principles (as it was obligated to do) to a seriously flawed statutory sentencing scheme, and held that, under Jackson, the most serious form of punishment (life without possibility of parole) was reserved

solely for those who proceeded to trial. See, Robtoy v. Kincheloe, 871 F.2d at 1480-1. As is next shown, that decision was correct.

2. The Court of Appeals' Decision Is Fully Consistent With This Court's Decision in Corbitt v. New Jersey, 439 U.S. 212 (1978).

In Corbitt v. New Jersey, 439 U.S. 212 (1978), this Court clarified the constitutional principles first articulated in United States v. Jackson, 390 U.S. 570 (1968). In Corbitt, the Court made clear the distinction between penalties for not guilty pleas which do violate the Constitution and those which do not. The distinction is this: It is unconstitutional under Jackson to "reserve the maximum punishment for murder for those who insist on a jury trial." Corbitt, 439 U.S. at 217.

The Court of Appeals in the present cases applied precisely this principle in holding unconstitutional the sentences at issue: because, and only because, Mr. Robtoy and Mr. Norman went to trial, they received a life sentence without possibility of parole. Had they pled guilty, they could have received at most life with possibility of parole after thirteen to twenty years (depending on the amount of earned "good time" credits). State v. Martin, supra; State v. Frampton, supra. The penalty of life without possibility of parole is "far more severe than [a] life sentence." Solem v. Helm, 463 U.S. 277, 297 (1983). Washington thus at the time of Mr. Robtoy's and Mr. Norman's trials did ". . . reserve the maximum punishment for those who insist[ed] on a jury trial," Corbitt at 217. The Court

of Appeals thus could not have been more precisely correct that the life without possibility of parole sentences were unconstitutional.

Petitioners attempt to claim that Corbitt compels a different result through a misguided effort to equate the New Jersey sentencing scheme (upheld in Corbitt) with the now repealed Washington scheme. The two schemes are fundamentally different. New Jersey did not reserve the greatest murder penalty only for those who went to trial: a defendant going to trial could receive a life sentence and a defendant who pled guilty could also receive the same life sentence. Under the old Washington system, a defendant pleading guilty to first degree murder could not receive a life without possibility of parole sentence, while a defendant going to trial could receive such a sentence.

The state's petition also overlooks the sharp and specifically stated difference between the provisions of the then existing Washington death penalty statute for life without possibility of parole sentences and other types of life sentences. Repealed RCW 9A.32.047 provided for a mandatory sentence of life without possibility of parole and included such specific admonitions as that a person ". . . shall not have that sentence suspended, deferred or commuted by any judicial officer, and the board of prisons terms and paroles, shall never parole a prisoner nor reduce the period of confinement." (Emphasis supplied.) The statute also provided that such person "shall not

be released as a result of any type of good time calculation, nor shall the Department of Social and Health Services permit the convicted person to participate in any temporary release or furlough program." (Emphasis supplied.) The Washington statute could not have been clearer in its delineation of the differences between a sentence of life with, versus life without, parole.

The Washington scheme thus flatly is not "analogous to the difference between the mandatory life sentence and judicial sentencing discretion in Corbitt." Petition at 13. The life sentence which a New Jersey defendant could get was the same type of life sentence, whether it resulted from trial or plea: that life sentence was "mandatory" after jury conviction but the same life sentence might be imposed by a judge on a guilty plea. As this court stated:

> Here, although the punishment when a jury finds a defendant guilty of first-degree murder is life imprisonment, the risk of that punishment is not completely avoided by pleading non vult because the judge accepting the plea has the authority to impose a life term.

Corbitt, 439 U.S. at 217. Under the Washington system, a trial could result in a penalty much more severe than possibly could have been imposed after a plea. Under the plain terms of Corbitt, this violates Jackson.

The Court of Appeals in this case had the benefit of Solem v. Helm, supra, a significant precedent from this Court which was not available to the Washington Supreme Court in Frampton, which petitioners totally ignore. The Washington Supreme Court acknowledged that Mr. Robtoy and Mr. Norman could

not have received a sentence of life without possibility of parole after a guilty plea; that court simply thought that the difference between life without any possibility of parole was not so much greater a penalty than life with parole eligibility as to invoke Jackson principles. See, State v. Frampton, 627 P.2d at 952-3. But in Solem, this Court made clear that there is a distinction of constitutional dimension between sentences of life without possibility of parole and life with parole eligibility after a term of years. As this Court stated:

> Helm's present parole is life imprisonment without possibility of parole. Barring executive clemency . . . Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in Rummell v. Estelle, [445 U.S. 263] (emphasis added).

463 U.S. at 297 (emphasis added).

In light of Solem, it is abundantly clear that Jackson, not Corbitt, controls this case. The Court of Appeals understood this, and thus relied on Jackson. This was correct and was fully consistent with the interpretation of Jackson contained in Corbitt.

3. The Court of Appeals Granted Respondents the Appropriate Remedy Mandated By a Correct Resolution of Settled Constitutional Principles.

Petitioners make a puzzling argument that the Court of Appeals allowed respondents to obtain a so called "double shot" at relief. Specifically, petitioners assert that the lower court created a ". . . fourth and impermissible category of individuals eligible for Jackson relief," namely, those defendants who plead

not guilty and demand a jury trial. (Petition at 11.) Stripped of the specious "double shot" catch phrase, this appears to be a rehash of petitioners' contention to the Court of Appeals that Robtoy and Norman lacked standing to assert their Jackson claims. If so, the Court of Appeals properly rejected that argument in a holding consistent with the many prior decisions of this and other courts.

In the twenty-one years since United States v. Jackson, courts have applied the rationale of that decision to a variety of situations in which a person, as did Norman and Robtoy, pleaded not guilty, demanded a jury trial and later obtained relief. Indeed, in Corbitt v. New Jersey, supra, this court considered on the merits an argument grounded in the Jackson analysis made by a person who, as here, had pleaded not guilty, demanded a jury trial and then raised a Jackson claim. This Court assumed the viability of Corbitt's Jackson claim, while denying it on the merits.

The Court of Appeals correctly concluded below that United States v. Jackson "is not limited to death penalty cases." 871 F.2d at 1481.[3] Sentencing schemes involving such widely differing situations as traffic offenses and animal leash laws

---

[3] The Ninth Circuit had previously considered the constitutionality of a cost provision in an income statute under a Jackson analysis. See, United States v. Chavez, 627 F.2d 953, 955-7 (9th Cir. 1980), cert. denied, 450 U.S. 924 (1981).

have been scrutinized under Jackson by many courts for many years.[4]

If petitioners' standing arguments were meritorious none of the claims set forth in these cited decisions would ever have been considered on the merits by this or other courts. In the present case, respondents received exactly that relief to which they were entitled under the law which has developed since United States v. Jackson. To accept petitioner's self-styled "double shot" argument would be to case aside twenty-one years of settled law.

Finally, the state's "double shot" argument completely overlooks this Court's decision in Solem v. Helm, supra. As shown above, in Solem this court recognized the fundamental difference between sentences of life with possibility of parole and other types of life sentences. The Court of Appeals, in a decision which post-dated Solem, recognized the same distinction in Chatman v. Marquez, 754 F.2d 1531 (9th Cir.), cert. denied, 474 U.S. 841 (1985), when it considered the constitutionality of changes in the California sentencing law. In sustaining a new law, the Court of Appeals held that a prisoner is "substantially

---

[4] See, Ludwig v. Massachusetts, 427 U.S. 618, 627 (1976) (upholding a two tier traffic system); Scarf v. United States, 606 F. Supp. 379, 383 (E.D. Va. 1985) (holding a forfeiture of collateral provision unconstitutional); United States v. Porter, 513 F. Supp. 245 (M.D. Tenn. 1981) (holding a collateral forfeiture law unconstitutional). See also, Commonwealth v. Bethea, 379 A.2d 102, 105 (Penn. 1977); In Re Lawallen, 152 Cal. Rptr. 528, 590 P.2d 383, 386 (Cal. S.Ct. 1979); see also, People v. C, 27 N.Y.2d 79, 261 N.E.2d 620 (N.Y. App. 1970); Veilleux v. Springer, 300 A.2d 620 (Vt. 1973); State v. Nichols, 247 N.W. 2nd 249 (Iowa 1979).

benefited" when his sentence is changed from one of life without possibility of parole to life with possibility of parole. 754 F.2d at 1536. Thus, the Court of Appeals' decisions below merely followed settled law from this court and elsewhere.

The Court of Appeals correctly concluded that Washington's former death penalty statute was unconstitutional when so viewed and that these respondents, Messrs' Norman and Robtoy, had standing to benefit from this unconstitutionally flawed and now repealed statute.

CONCLUSION

For the foregoing reasons, respondents Michael Robtoy and Nedley G. Norman, Jr. respectfully urge this court to deny the petition in this matter.

DATED this 24th day of October, 1989.

Respectfully submitted,

BUKEY & BENTLEY

By: _____
David B. Bukey
Counsel of Record for
Michael Robtoy

By: _____
John B. Midgley
Counsel of Record for
Nedley Norman

9.95.115. Parole of life term prisoners

The board of prison terms and paroles is hereby granted authority to parole any person sentenced to the penitentiary or the reformatory, under a mandatory life sentence, who has been continuously confined therein for a period of twenty consecutive years less earned good time: *Provided,* The superintendent of the penitentiary or the reformatory, as the case may be, certifies to the board of prison terms and paroles that such person's conduct and work have been meritorious, and based thereon, recommends parole for such person: *Provided,* That no such person shall be released under parole who is found to be a sexual psychopath under the provisions of and as defined by chapter 71.12 RCW.

Enacted by Laws 1951, ch. 238, § 1.

RULE 4.2 PLEAS

(a) Types. A defendant may plead not guilty, not guilty by reason of insanity or guilty.

(b) Multiple Offenses. Where the indictment or information charges two or more offenses in separate counts the defendant shall plead separately to each.

(c) Pleading Insanity. Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.

(f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court later determines under RCW 9.94A.090 that the agreement is not binding, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered.

(g) Written Statement. A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty: